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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-449

COOK & CO., INC.,
Petitioner,

VERSUS

CLAUDIATTE PIERCE, as surviving widow of Teddy Joe Pierce, Deceased, for herself and Letitia Pierce, minor child of Teddy Joe Pierce, Deceased,
Respondents,

COOK & CO., INC.,
Petitioner,

VERSUS

STEPHEN ELLENWOOD, a Minor under the age of 21 years, who sues by Judson Ellenwood, as Next Friend,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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INTRODUCTION

The statement of the case set out by Petitioner is accepted and will not be repeated. Out of this factual background, the Court of Appeals for the 10th Circuit has granted Respondents' Motion and vacated their own judg-

ment under Rule 60(b)(6) remanding the case back to the Western District of Oklahoma for its consideration. Respondents have moved the trial court to vacate their own judgment in the light of the decision of the Court of Appeals to vacate and the reasons stated for doing that in their opinion. Respondents' Motion in the District Court had been stayed, pending action on Petitioner's Application for Writ of Certiorari in this Court.

The Petitioner raises four questions in their Brief as follows:

I. The Tenth Circuit improvidently usurped the discretionary authority of the trial court.

II. The Respondents failed to preserve any question for Rule 60(b) review.

III. A change in judicial precedent is an insufficient basis for 60(b) relief from a final judgment.

IV. The instant case presents no "Extraordinary Circumstance" justifying Rule 60(b)(6) relief.

To these questions Respondents submit the following counter-points.

I. The Tenth Circuit properly assumed jurisdiction in this cause.

II. The Doctrine of Election of Remedies is not applicable to this case.

III. Finality of judgment must yield to the interest of justice.

IV. The instant case is unique and justifies relief under Rule 60(b)(6).

In support of its counter-points Respondents submit short clarifying arguments.

I.

THE TENTH CIRCUIT PROPERLY ASSUMED JURISDICTION IN THIS CAUSE

Petitioner first asserts impropriety on the part of the Court of Appeals in accepting and acting on Respondents' Motion to Vacate. The procedural problem raised is, as the Court of Appeals indicated, one much discussed. Citing *Brady* v. *Beams*, 10 Cir., 132 F.2d 985, 986, *cert. denied* 319 U.S. 747; *National Brake & Electric Company* v. *Christensen*, 254 U.S. 425, 430; and *Butcher & Sherred* v. *Welsh*, 3 Cir., 206 F.2d 259, 262, *cert. denied* 327 U.S. 799, the Court of Appeals indicates that the trial court could well believe it is without power to determine a legal question contrary to the decision of the Court of Appeals. The *Butcher* case specifically held that while the Federal rules providing for relief from a final judgment enlarged the power of District Courts, it did not confer upon such courts the power to alter or amend a judgment which has been affirmed by the Court of Appeals. In the case here for consideration, the Court of Appeals had in fact affirmed the District Court, *Pierce, et al.* v. *Cook & Co., Inc.*, 10 Cir., 437 F.2d 1119, and a mandate had issued.

According to one view there is a "Judgment Rule" that prohibits a Federal District Court from departing without leave from the judgment of an appellate court once it has issued its mandate, *Greater Boston Television Corp.* v. *F.C.C.* (1971), 463 F.2d 268. In *Hartman* v. *Lauchli* (C.A. Mo. 1962), 304 F.2d 431, the Court concluded that the District Court could not, without the consent of the Court of Appeals, disturb a judgment of that Court. There is then

ample authority supporting Respondents' Motion to Vacate filed under Rule 60(b) in the Court of Appeals, and supporting the jurisdiction of that Court. Once accepting jurisdiction it was well within the power of the Court of Appeals to treat the substantive issue raised by the unusual circumstances of this case. Exercising its plenary powers the Court of Appeals held an *en banc* hearing and rendered an opinion dealing with the issues before them, remanding the case back to the District Court with directions, a time honored expedient preventing multiple appeals. The interest of justice seem well served by the acts of the 10th Circuit Court of Appeals particularly in a case where all the parties are conscious of the time span.

II.

THE DOCTRINE OF ELECTION OF REMEDIES IS NOT APPLICABLE TO THIS CASE

The Petitioner advances the theory that Respondents by asserting the applicability of the Motor Carrier Act in its initial appeal to the Court of Appeals elected an inconsistent remedy and cannot now vacate the judgment of that Court.

The doctrine of election of remedies is now largely an obsolete one, *Estate Counseling Service, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* (10 Cir. 1962), 303 F.2d 527. Since the adoption of the Rules of Federal Procedure there is authority that it may not even be applicable in Federal cases, *Bernstein* v. *United States* (10 Cir. Colo.), 256 F.2d 697, *cert. dism'd* 358 U.S. 924. Mr. Justice Brandeis' dissent in the 1922 case cited by Petitioner, *United States*

v. *Oregon Lumber Co.*, 260 U.S. 290, is a telling attack on the doctrine and the more prevalent view today.

However, assuming the doctrine is still intact it would not apply in this cause. The essential elements of the doctrine are the existence of two or more remedies, the inconsistency between such remedies and a choice of one of them. *Thompson* v. *Phillips*, Ark., 284 S.W.2d 842; *Taylor* v. *Robertson Petroleum Co.*, Kan., 137 P.2d 150; *Gaines Brothers Co.* v. *Fourth National Bank*, Okla., 133 P.2d 742, 144 A.L.R. 1434. The election of remedies presupposes a right to elect. The facts must be such as afford the party a choice of remedies inconsistent in character, *Estate Counseling Service, Inc.* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc., supra.* The fact that the remedy invoked was at the time unavailable precludes the application of the rule. A party is not barred from invoking a proper though inconsistent remedy when, in its first action, he has chosen and pursued, even to an unfavorable judgment, a remedy which was not available to him because either the facts tend to be different from when he supposed them to be or the law applicable to the facts was found to be other than supposed. *Swanson* v. *Baldwin*, Iowa, 85 N.W.2d 576, 69 A.L.R.2d 249; *State ex rel. Chaub* v. *Scottsbluff*, Neb., 100 N.W.2d 202, 76 A.L.R.2d 1304. One court has even said that inconsistency of remedies is not an inconsistency between the remedies themselves, which may often happen when the same facts are relied upon as the basis of the several alternative remedies, but means that a certain state of facts relied upon as the basis of a certain remedy is inconsistent with and repugnant to another certain state of facts relied

upon as the basis of another remedy. *Abdallah* v. *Abdallah* (Cir. 3, 1966), 359 F.2d 170.

Under the principles of the doctrine, an assertion of the applicability of the Motor Carriers Act in the Court of Appeals could hardly be described as a remedy respondent elected. At best it was a hypothesis which that Court rejected. The lower court had already rejected our cause on the basis of Oklahoma law which clearly stated that a shipper had no duty to third persons for the negligent acts of an independent contractor, *Marion Machine Foundry & Supply Co.* v. *Duncan*, Okla., 101 P.2d 813 (1940). At this point we had presented two theories both rejected and obtained no remedies at all. Then the *Davis* case specifically overruled *Marion* and presented the Court of Appeals with the unique situation with which we are now dealing. The real issue is not the largely obsolete doctrine of election of remedies but whether or not this is a case where the Court may vacate a judgment under specific rules designated to do that in an appropriate case. We seek now to re-assert our right to pursue the remedies state law makes available to one in Respondents' position. The question that the Court of Appeals properly considered is not whether we are barred because of some election of remedies but whether we are barred by a judgment which we seek to vacate.

III.

FINALITY OF JUDGMENT MUST YIELD TO THE INTEREST OF JUSTICE

Petitioner's third proposition relates to specific cases where courts have refused relief from the finality of a judgment. In virtually every one of these cases the party asserting Rule 60(b) could have obtained relief by the exercise of appellate remedies. In *Akerman* v. *U. S.*, 340 U.S. 193, 71 S.Ct. 209 (1950), the Court held that a freely made decision not to appeal a denaturalization judgment may not be excused by permiting recourse to Rule 60(b). Likewise in *Polites* v. *United States*, 364 U.S. 427, 81 S.Ct. 202 (1960), relief was denied under Rule 60(b) where the defendant made a deliberate decision not to appeal. However, the Court did state in the course of that opinion:

> "we need not go so far here as to decide that when an appeal has been abandoned and not taken because of a clearly applicable adverse rule of law, relief under Rule 60(b) is inflexibly to be withheld where there has been a clear and authoritative change in governing law."

This dicta in *Polites* points to Respondents' case. No relief was possible to Respondents by appellate means. The relief they sought was only available in the State Courts from which they had been removed by Petitioner. Petitioner's argument that the matters here raised were or could have been litigated on appeal is not in accord with the facts. No appellate relief was available under the Erie Doctrine as the Federal Courts were bound to Oklahoma law. Neither is it clear that Respondents had available the same avenues

as Davis who dismissed his cause in the Federal District Court before judgment, acquired a non-resident guardian from Tennessee defeating diversity, and was thereafter able to secure a reversal of the *Marion* case in the Supreme Court of Oklahoma, *Hudgins* v. *Cook Industries, Inc.*, Okla., 521 P.2d 813 (1974). It should be noted that while criticizing Respondents' failure to exercise this stratagem, Petitioners nevertheless challenged it in *Hudgins* v. *Cook Industries, Inc.*, 310 F.Supp. 32 (1970). The Davis boy was rendered incompetent in the accident, but Respondent, Ellenwood, was competent and attained his majority in November of 1968 long before the District Court rendered summary judgment in December, 1969. The surviving widow, Pierce, might have sought the subterfuge of a Tennessee administrator, but the real question is not whether diversity might have been circumvented in both these cases, but whether or not Respondents have lost their right to trial in this cause by not seeking that circumvention by the appointment of a "straw person." The trend today is to eliminate the artificial creation and destruction of diversity jurisdiction and a growing number of Federal cases have neutralized attempts to create or defeat Federal jurisdiction by utilizing the anticollusion Statute, 28 U.S.C.A. 1359; *McSparran* v. *Weist* (Cir. 3, 1968), 402 F.2d 868; Moore's Federal Practice and Procedure, 3606, 3642.

Petitioners place reliance on *Collins* v. *City of Wichita* (Cir. 1958), 254 F.2d 837. The Court of Appeals pointed out the distinction between that case and this noting the decisional change there was in an unrelated case. Respondents have never asserted that a change in decisional law should reopen all cases decided under the old law. The reversal of *Marion* by a case (*Davis*) which was transactionally the same as *Davis* and out of which the death and injuries Respondents complained of arose in an extraordinary blend or coalescence of circumstance. A further distinguishing element of *Collins* was pointed out in *Polites* v. *United States, supra*, where the Court noted that a modification of that judgment would have retroactively disturbed existing property rights. Here no such rights are involved and the evidence has been carefully and fully preserved by depositions, interrogatories and other documents, all listed in Judge Eubanks' Findings of Fact and Conclusions of Law in the District Court's original Summary Judgment. The Petitioners' complaint concerning the passage of time is countered by the fact that the *Davis* case was only terminated by an Oklahoma District Court judgment on September 16, 1974.

Respondents assert that there are no failures on their part to pursue reasonable remedies. They were simply caught in the limbo between the dying of old precedent and the formulating of new.

IV.

THE INSTANT CASE IS UNIQUE AND JUSTIFIES RELIEF UNDER RULE 60(b)(6)

The case before the Court is more compelling as the Court of Appeals notes in *Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25, 86 S.Ct. 153 (1965), for the reason that there two Federal Courts had differed as to construction of a Federal Statute while here in two cases arising out of the same transaction or occurrence, differing

results were reached by reason of the overruling of the *Marion* case by a case which was transactionally the same as Respondents' case, where relief was denied. In diversity cases the results in Federal Court should be substantially the same as those in State Court where litigation arises out of the same transaction. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 74-75. Here, the Court notes, they were not. In *Gondeck* the Court granted a rehearing out of time because "the interest of justice would make unfair the strict application of our rules" thereby granting persons injured in a common accident the same relief. Again Respondents' case is more compelling; no setting aside or overriding of existing rules need be granted here. Respondents cannot be faulted in failing to appeal as in *Akerman* or *Polites* or in *Title* v. *United States* (9th Cir.), 263 F.2d 28, nor have they failed to make appropriate procedural moves to obtain the right to trial accorded Davis.

While Rule 60(b)(6) has been considered sparingly by the courts there are several Federal cases where the rule has been invoked and where relief has been granted. In *Tarkington* v. *United States Lines Co.* (2nd Cir. 1955), 222 F.2d 358, the Court directed a verdict against a stevedore who did not then file a timely Motion to Appeal. Judgment became final. The Supreme Court then rejected in another case the doctrine on which the Judge rendered his initial decision. The Court indicated that while the trial court was correct in its original decision not to permit appeal out of time, the court should have treated the Plaintiff's Motion for New Trial as a Motion under Rule 60(b)(6). The appellate court granted relief and remanded the case for a new trial on the issue incorrectly determined.

There is a strong similarity between this case and Respondents' case but again Respondents' case seems more compelling. Respondents cannot be faulted for failing to appeal. In *Tsakomites* v. *Trans Pacific Carrier Corp.*, 322 F.Supp. 722, Rule 60(b)(6) was invoked. In that case plaintiff instituted an action under the Jones Act for injuries in 1959. In 1965 the Federal District Court held that plaintiff had insufficient contracts with the United States to successfully invoke the Jones Act. This was appealed to the Court of Appeals where an *en banc* hearing held against the plaintiff. Certiorari was denied in 1967. In 1970 the Supreme Court ruled that the Jones Act did apply to a sailor where the facts were identical (although not transactually the same as in Respondents' case). On the basis of this case, the United States District Court vacated a judgment five years old and due to the "exceptional circumstances" granted Tsakomites his day in court, vacating the judgment of March 23, 1965. In *Erick Rios Bridoux* v. *Eastern Airlines* (D.C. Cir. 1954), 214 F.2d 207, the appellate court affirmed relief granted the defendant from a very large default money judgment while at the same time denying him the right to prosecute his counter claim because he had failed to keep in touch with counsel. The appellate court indicated that the defendant's application to vacate the judgment against him had been addressed to the sound discretion of the trial court and its exercise could not be disturbed on appeal except for abuse. The relief granted was granted under Rule 60 (b)(6). In a case where time was the major issue, the Court in *Pierre* v. *Bermuth Lembcke*, 20 F.R.D. 116 (1956), granted relief under Rule 60(b)(6) where a personal injury had been suffered in 1948 and an action

commenced in that year. The plaintiff was committed to a mental institution in 1951 while the case was pending. The case was subsequently dismissed. The plaintiff was discharged in 1955 and more time lapsed while her attorney got in touch with her. In all, eight years had transpired when she instituted the Motion to Vacate the judgment. The Court awarded the relief noting the "grand reservoir of equitable power to do justice" and stating that while there was little doubt that the trial of the case would cause hardships on the defendant due to the lapse of time, the hardship should not prevent the plaintiff from securing a determination of her cause of action on the merits. The Court noted that the defendant could have protected itself by concluding investigation of the case and taking depositions. Again, the case does not seem any more compelling than Respondents' case. The Supreme Court has considered Rule 60(b)(6) in *Klaprott* v. *United States*, 335 U.S. 601, 369 S.Ct. 384 (1949), an immigration case. The Court there granted relief as the appellant was ill and in jail and there was no "neglect" on his part. The Court concluded that the language of the "other reason" clause of Rule 60(b) vests power in the Court adequate to vacate judgments wherever such action is appropriate to accomplish justice.

Rule 60(b) motion is addressed to the sound discretion of the Court, *Caribou Four Corners, Inc.* v. *Truck Insurance Exchange* (10 Cir.), 443 F.2d 796, 799, and it would be difficult to state that the Court of Appeals, after consideration and reconsideration at an *en banc* hearing in Respondents' cause, did not exercise sound discretion under these facts. The Court acts out of "the grand reservoir of equitable power to do justice in a particular case" and the

further guide that discretion should ordinarily incline toward granting rather than denying relief where no actual injustice will ensue. *U. S. v. Willis*, Ark., 109 F.Supp. 456; *Tozer* v. *Charles A. Krause Milling Co.* (3rd Cir. 1951), 189 F.2d 242.

CONCLUSION

This is an exceptional case that involves multiple suits and different forums arising out of one life-shattering accident and the reversal of long-established precedent in a State Court after judgment in a Federal Court based on Oklahoma law. As such it is an unusual coalescence of circumstance. The Court of Appeals reasonably exercised its jurisdiction under its commitment to a liberal construction of Rule 60(b). That jurisdiction was properly invoked by Respondents and certiorari should be denied.

Respectfully submitted,

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